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IN THE
Supreme Court of the United States

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ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICI CURIAE* OF ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA, AND ST. CROIX CHIPPEWA INDIANS OF WISCONSIN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *MERRION* RECOGNIZES THAT THE TRIBAL POWER TO TAX IS AN ESSENTIAL ELEMENT OF INDIAN TRIBES' RETAINED POWERS OF SELF-GOVERNMENT 4

A. The Federal Goals of Self-Determination and Self-Sufficiency Depend on the Tribal Tax Power 4

B. Indian Tribes' Inherent Sovereign Authority to Tax Economic Activity on the Reservation is a Right of Self-Government 5

II. *MONTANA* AND *STRATE* INFORM THE APPLICATION OF THE *MERRION* TEST REGARDING THE POWER TO TAX ACTIVITY ON NON-INDIAN-OWNED FEE LAND 9

A. The Principles of *Merrion* are Reinforced by *Montana* and *Strate* 9

B. The *Merrion* Test, as Informed by the First *Montana* Exception, Establishes that the Tax Here at Issue Applies to All Reservation Tourists and Travelers 11

C. The Tribal Tax Here At Issue Is Essential to Tribal Self-Government, as the *Merrion* Test, Informed by the Second *Montana* Exception Shows 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Arkansas v. Farm Credit Servs. of Central Ark., 520 U.S. 821 (1997) 7

Ashcroft v. United States Dept. of Interior, 679 F.2d 196 (9th Cir. 1982) 13

Atkinson Trading Co. v. Shirley, 210 F. 3d 1247 (10th Cir. 2000) 3, 15, 16

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 12

Buster v. Wright, 135 F. 947 (8th Cir. 1905) 2, 10

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 4, 18

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 15

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 8, 13, 14

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 9, 14

Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) ..... *passim*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) ..... *passim*

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

Morris v. Hitchcock,
194 U.S. 384 (1904) 10, 12

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 12

Strate v. A-1 Contractors,
520 U.S. 438 (1997) ..... *passim*

Snow v. Quinault Indian Nation,
709 F.2d 1319 (9th Cir. 1983) 12

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) ..... *passim*

Wisconsin v. J.C. Penney Co.,
311 U.S. 435 (1940) 7

STATUTES AND REGULATIONS:

Act of March 3, 1903, ch 994, § 10,
32 Stat. 1009 (codified at 25 U.S.C. § 262) 13

Indian Civil Rights Act,
25 U.S.C. § 1302 18

25 C.F.R. § 141.11 14

LEGISLATIVE MATERIALS AND RULES

141 CONG. REC. S11,881 (1995) 5

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

INTEREST OF *AMICI CURIAE*[1]

Amici Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Confederated Tribes of the Colville Reservation, Lac du Flambeau Band of Lake Superior Chippewa, and St. Croix Chippewa Indians of Wisconsin, respectfully submit this brief *amici curiae* in support of Respondents by and through their attorneys pursuant to Sup. Ct. R. 37.3.

Amici are federally-recognized Indian tribes each with a reservation, on which they provide basic governmental services. These services include, but are not limited to, police and fire protection, emergency medical services, construction and maintenance of roads, environmental protection, natural resource management, public health, and sanitation.

Amici therefore have an interest in the outcome of this case concerning tribal authority to impose reasonable taxes on transactions on reservation fee lands involving non-members who benefit from services and the civilized society provided by tribal governments.

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[1] The parties have consented to the filing of this brief and a joint letter evidencing their consent has been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Sup. Ct. R. 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Indian tribes retain their inherent sovereign authority to tax, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137; *see also Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198, 201 (1985). This power "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion*, 455 U.S. at 137. When a tribe's inherent sovereign authority to tax is challenged, the basic question is whether the tribal interests that justify the tax, and the benefits provided to the taxpayer by the tribe, outweigh the burden of the tax.

2. The decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), do not conflict with this test. Indeed, these decisions recognize tribal tax authority and confirm that this authority may extend to non-Indian activity on non-Indian owned fee land, *Montana*, 450 U.S. at 565-66; *Strate*, 520 U.S. at 457, as *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), on which these cases rely, confirms. Thus, properly read, the principles of *Montana* simply inform the application of the *Merrion* test.

3. In this case, the *Merrion* test, as informed by the consensual relationship test of *Montana*, establishes that the tribal tax is valid. By choosing to lodge on the Reservation, and to avail themselves of the benefits and services of tribal governance, travelers and tourists establish a consensual relationship between themselves and the Nation and a significant tribal interest in the activity subject to the tax. In addition, the value of the Navajo Reservation as a stopping

point for travelers and tourists is generated in significant part by the Nation's governance of the Reservation, a value which extends to the Atkinson Trading Company and its patrons. In this case, there is no question that the burden of the tax is reasonable, as was conceded in the Court below. Indeed, the Navajo tax is actually imposed at a lower rate than that imposed by many municipalities. *Atkinson Trading Co. v. Shirley*, 210 F. 3d 1247, 1264 (10th Cir. 2000).

4. The same conclusion is sustained by the *Merrion* test, read in conjunction with the second *Montana* exception. In order to establish and maintain a civil society, a tribe must provide governance, stability, and services sufficient to attract persons and entities to live, work and make their lives on the reservation. When the tribe has provided an environment that does so, the economic activities of those who benefit from it clearly have a direct effect on the political integrity, economic security, and the health and welfare of the tribe. The exercise of the tax power over non-Indian activities on non-Indian owned fee land in these circumstances is thus essential to the right of self-government, *Merrion*, 455 U.S. at 137; *Kerr-McGee*, 471 U.S. at 201, and valid under the second *Montana* exception. *See Strate*, 520 U.S. at 459.

ARGUMENT

I. *MERRION* RECOGNIZES THAT THE TRIBAL POWER TO TAX IS AN ESSENTIAL ELEMENT OF INDIAN TRIBES' RETAINED POWERS OF SELF-GOVERNMENT

A. The Federal Goals of Self-Determination and Self-Sufficiency Depend on the Tribal Tax Power

Indian tribes are now pursuing "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987). Thus, Indian tribes today police their own reservations, operate fire departments, adjudicate civil and criminal matters, provide emergency medical services, and protect the lands and waters of the reservation. They face substantial challenges in this effort, as is reflected in a wide range of social indicators showing that Indian people live in conditions that are far below the national average in virtually every significant category.[2] While much

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[2] As Senator McCain starkly acknowledged in 1995:

> Indian families live below the poverty line at rates nearly three times the national average. Nearly one of every three Native Americans lives below the poverty line. One-half of all Indian children on reservations under the age of 6 are living in poverty.
>
> On average, Indian families earn less than two-thirds the incomes of non-Indian families. As these statistics indicate, poverty in Indian country is an everyday reality that pervades every aspect of Indian life. In this country we pride ourselves on our ability to provide homes for our loved ones. But in Indian country a good, safe home

remains to be done, the tribes' pursuit of self-determination has already had a significant positive impact. As is particularly relevant here, it has brought more people – Indian and non-Indian alike – to Indian country to live, work, visit and partake of Indian history and culture as understood by Indian people.

Whether Indian tribes can succeed in their pursuit of self-determination and self-sufficiency will depend, in large part, on whether they can raise the revenues needed to operate their governments, provide the services on which reservation residents and visitors depend, and build their economies. To do so, tribal governments, like their state and federal counterparts, must rely on the tax power.

B. Indian Tribes' Inherent Sovereign Authority to Tax Economic Activity on the Reservation is a Right of Self-Government

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is a rare commodity.

There are approximately 90,000 Indian families in Indian country who are homeless or under-housed. Nearly one in five Indian homes on the reservation are classified as severely overcrowded. One third are overcrowded. One out of every five Indian homes lacks adequate plumbing facilities. Simple conveniences that the rest of us take for granted remain out of the grasp of many Indian families.

Indians suffer from diabetes at 2½ times the national rate. Indian children suffer the awful effects of fetal alcohol syndrome at rates far exceeding the national average. Perhaps most shocking of all, Indian youth between 5 and 14 years of age commit suicide at twice the national rate. The suicide rate for Indians between the ages of 15 and 24 is nearly three times the national rate.

141 CONG. REC. S11,881 (1995) (Statement of Sen. McCain).

That Indian tribes retain their inherent sovereign authority to tax is undeniable. This Court's landmark ruling in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), established that the tribal power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137. This was confirmed by the Court in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), which holds that "[t]he power to tax members and non-Indians alike is surely an essential attribute of . . . self-government; the Navajos can gain independence from the federal government only by financing their own police force, schools and social programs." *Id.* at 201; *see also, Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980).

In so holding, *Merrion* and *Colville* also make clear that Indian tribes have not been implicitly divested of their power to tax. *Merrion*, 455 U.S. at 139-40, 145; *Colville*, 447 U.S. at 152-54. As the Court held in *Merrion*, relying on *Colville*, "[v]iewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government." *Merrion*, 544 U.S. at 139. Accordingly, tribal powers to tax "are not implicitly divested by virtue of the tribes' dependent status." *Colville*, 447 U.S. at 153.

The tribal tax power "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion*, 455 U.S. at 137. These principles reflect "the views of the three federal branches of government, as well as general principles of taxation . . . that Indian tribes enjoy authority to

finance their governmental services through taxation of non-Indians who benefit from those services." *Id.* at 140.[3]

The Court's holding in *Merrion* setting forth the source of the tribal tax power also describes its bounds. That power arises from the tribe's authority to control economic activities on the reservation and to defray the cost of providing governmental services by requiring contributions from those engaged in such activities. *Id.* at 137. When a tribal tax is challenged, the basic question is whether (1) the tribal interests that justify the tax and (2) the benefits provided to the taxpayer by the tribe (3) outweigh the burden of the tax.

The application of the test requires a concrete factual setting. But the contours of the test are reflected in *Merrion* and *Colville*. We consider each element in turn.

Merrion confirms that the tribal interest in taxation is established by the fundamental importance of taxation to tribal governance. Taxation enables a government to raise the revenues necessary to meet its responsibilities to protect persons and property, and to provide a social and economic environment that will attract persons and entities to visit, live, and work within the sovereign's borders. "The power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). So

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[3] The *Merrion* Court's examination of the source of tribal tax authority also rejects any claim that its existence depends exclusively on the tribe's power to exclude nonmembers from tribal lands. *Id.* at 137-144. "[T]he Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management." *Id.* at 141. Thus, the status of the land on which taxable activity occurs is not determinative of the existence of this power, as we show *infra* at 9-19.

too with Indian tribes. It is also clear that the tribal interest in a tax may be enhanced by its relationship to the taxable activity. As the Court stated in *Merrion*, "the tribe's interest in levying taxes on nonmembers to raise 'revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Merrion*, 455 U.S. at 138 (quoting *Colville*, 447 U.S. at 156-57).

Merrion also establishes that the benefits which support tribal taxation include the "substantial privilege of carrying on business on the reservation" and "the provision of police protection and other governmental services, as well as . . . the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-38 (citations and internal quotations omitted). These benefits are reflected in the stability that tribal government provides to social and economic relations on the reservation, and in the services that the tribe provides to those engaged in such relations.

These two elements, the tribal interest in the tax and the benefits to the taxpayer, are weighed against the burden of the tax on the taxpayer. Whether the taxpayer's "contribution 'to the general cost of providing governmental services,'" *id.* at 138 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981)), imposes a burden which exceeds the weight of the first two elements will depend on the specific requirements of the tax under review.[4] The test is, of course, not whether the tax paid equals the value of the services

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[4] We note that the taxpayer in *Merrion* "d[id] not challenge the tax on the ground that the amount of the tax was not fairly related to the services provided by the Tribe." *Merrion*, 455 U.S. at 157.

consumed. The "advantages of a civilized society," *Merrion*, 455 U.S. at 137, are in this regard like the "intangible value of citizenship in an organized society [and are] not easily measured in dollars and cents." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189 (1989). In addition, settled law makes clear that a tax is not subject to challenge on the ground that the taxpayer does not receive benefits equal in value to the tax paid. *Id.* at 189-91.

These principles confirm the power of Indian tribes to tax non-Indian activities on the reservation. The only question to be determined is whether the specific tribal tax properly reaches the specific non-Indian activity.

II. *MONTANA* AND *STRATE* INFORM THE APPLICATION OF THE *MERRION* TEST REGARDING THE POWER TO TAX ACTIVITY ON NON-INDIAN-OWNED FEE LAND

A. The Principles of *Merrion* are Reinforced by *Montana* and *Strate*

Under *Merrion*, the validity of a tribal tax on non-Indian activity turns on whether the tribal interest in the economic activity subject to the tax, together with the benefits provided to the taxpayer by the tribe, outweigh the burden of the tax on the taxpayer. The decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), do not conflict with this test, or with the principles of *Merrion*, *Kerr-McGee* or *Colville*.[5]

Neither *Montana* nor *Strate* presented a question of tribal tax authority. These cases address the exercise of tribal civil regulatory and adjudicatory authority over non-Indians on non-

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[5] *Montana* was decided before *Merrion* and *Kerr-McGee*.

Indian owned fee land. In *Montana*, the Court held that the Crow Tribe could not prohibit non-Indians from hunting and fishing on non-Indian owned fee land. *Montana*, 450 U.S. at 563-67.[6] In *Strate*, the Court held that tribal civil adjudicatory jurisdiction was lacking over a tort suit between two non-Indians arising from a motor vehicle accident on a public highway which the Court held was the legal equivalent of non-Indian owned fee land. *Strate*, 520 U.S. at 456-60. In *Strate*, the Court indicated that *Montana* "describe[s] a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. The first exception "covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 456-57 (quoting *Montana*, 450 U.S. at 565). The second exception applies to "conduct that 'threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.'" *Id.* at 457 (quoting *Montana*, 450 U.S. at 566).

While not tax cases, *Montana* and *Strate* actually reinforce this Court's tribal tax decisions. *Montana* specifically acknowledges that the exercise of the tribal tax power upheld in *Colville*, *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), is in accord with the first of the two *Montana* exceptions. *Montana*, 450 U.S. at 565-66. *Strate* confirms the same conclusion. *Strate*, 520 U.S. at 457. Indeed, *Buster*, which the Court also relied on in *Merrion*, 455 U.S. at 141, and *Colville*, 447 U.S. at 153,

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[6] In contrast to the *Montana* ruling on this regulatory issue, it is clear that the tribal power to tax is a retained power of tribal self-government, as we show *supra* at 6.

expressly upheld a tax on non-Indian activity on non-Indian owned fee land.

Accordingly, the principles of *Montana* simply inform the application of the *Merrion* test. When a tribe's inherent sovereign authority to tax non-Indian activity on non-Indian owned fee land is challenged, the determination of the tribal interest in the economic activity subject to the tax, and of the benefits provided to the taxpayer by the tribe, should reflect the inquiries addressed in the *Montana* exceptions. This should, of course, be done with recognition that the tribal tax authority is different in kind and purpose from tribal regulatory authority. This gives effect to both the holdings in *Merrion* and *Kerr-McGee*, which recognize that tribal tax power over non-Indians is an essential element of the right of self-government, and to the principles of *Montana* and *Strate*. In short, land ownership is not determinative, but is rather only one factor to be considered.

B. The *Merrion* Test, as Informed by the First *Montana* Exception, Establishes that the Tax Here at Issue Applies to All Reservation Tourists and Travelers

The application of the *Merrion* test is informed by the consensual relationship exception of *Montana* in the following manner. Under the *Merrion* test, the tribal interest in the tax is shown by the importance of taxation to a government's ability to function, and by recognition that this interest "'is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Merrion*, 455 U.S. at 138 (quoting *Colville* 447 U.S. at 156-57). The *Merrion* test then seeks to evaluate the benefits to the taxpayer from the stability and services that tribal government provides to those engaged in economic activities on the reservation.

The consensual relationship exception in *Montana* inquires whether the non-Indian subject to the tribal enactment has entered into consensual relationships with the tribe or tribal members.[7] Its requirements may be met in either of two circumstances.

First, such relationships may arise from consumer transactions, as in *Colville,* from agreements for the use of tribal lands, as in *Merrion*,[8] or from other arrangements between the non-Indian and the tribe or its members. In these instances, the requirements of the consensual relationship exception are plainly met. A tax on the non-Indian activities may then be imposed and is valid, whether these activities occur on non-Indian owned fee land or Indian land.

Second, a consensual relationship between the tribe and the non-Indian subject to a tribal tax may be shown where the tribe provides benefits on which the taxpayer relies. In these

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[7] In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), this Court pointed out that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established." *Id.* at 333. Thus, although Petitioner's customers may enter the Navajo Reservation on public highways, this exception to the tribe's power to exclude does not limit the lesser power of the Navajo Nation to tax commercial transactions in which they engage while within its reservation, whether or not on fee lands. *See Morris v. Hitchcock*, 194 U.S. 384, 392-93 (1904) (tribal tax upon livestock grazed by nonmembers on fee lands upheld); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983) (business license fee and tax on nonmember business activities on fee lands within reservation sustained); *see also, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (tribal zoning of fee lands owned by nonmembers in "closed area" of reservation upheld).

[8] As *Merrion* shows, when there is such an agreement, the tribal power to tax exists and is unaffected by the agreement in the absence of a "clear and unmistakable surrender of taxing power." *Merrion*, 455 U.S. at 148.

circumstances, the consensual relationship arises from the tribe's provision of an environment that attracts persons and entities to visit, live, and work on the reservation and the taxpayer's consumption and reliance on the benefits and services so provided. In this context, the consensual relationship exception recognizes *first*, that the availability of fire, police, and other services, as well as the advantages of a civilized society, depend on a government's ability to raise taxes; and, *second*, that participation in reservation affairs and enjoyment of the accompanying benefits provided by the tribe, whether for business, community, tourism or other purposes, is a voluntary act. Thus, if a taxpayer benefits from these services and from the ordered society maintained by tribal governance, a consensual relationship is established.

Applying the *Merrion* test, as informed by the first *Montana* exception, it is clear that the Navajo Nation's interest in applying its hotel occupancy tax to persons who visit the Reservation as tourists and travelers and stay at the Atkinson Trading Company is substantial and reflects significant consensual relationships. By entering the Navājo Reservation, choosing to stay there overnight, and availing themselves of the benefits of the Navajo Reservation, including the protection and security afforded by tribal governance, travelers and tourists establish a consensual relationship between themselves and the Nation and create a significant tribal interest in the activity subject to the tax.[9] Travelers and tourists depend on

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[9] Notwithstanding the fact that its operations are conducted solely on fee lands, Atkinson Trading Company has been determined to be an "Indian trader" and thus subject to regulations promulgated by the Commissioner of Indian Affairs. *Ashcroft v. United States Dept. of Interior*, 679 F.2d 196 (9th Cir. 1982); *see also*, Act of March 3, 1903, ch. 994, § 10, 32 Stat. 1009 (codified at 25 U.S.C. § 262). The applicable regulations covering trading on the Navajo Reservation, 25 C.F.R. Part 141, provide in material part:

both the benefits of a civilized society and the availability of essential services when seeking lodgings. If police, fire and emergency medical services were not available, the security that a lodger needs for rest and recreation would be lacking. In contrast, where such services are available, the expectations necessary to enjoy a hotel stay are present. Thus, the value of these services is received whether or not an individual has occasion to call upon their availability.[10]

> The regulations in this part do not preclude the Hopi, Navajo, or Zuni tribal councils from assessing and collecting such fees or taxes as they may deem appropriate from reservation businesses.

25 C.F.R. § 141.11(a). By continuing to do business within the Navajo Reservation and thus remaining subject to the foregoing regulations, Atkinson Trading Company necessarily accepted application of the Navajo hotel occupancy tax to its commercial rentals.

[10] This is true not simply as a matter of fact, but also as a matter of law. Thus, as the Court made clear in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), in rejecting a tribal challenge to state taxation of a non-Indian mineral rights lessee's activities on trust lands:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good.

Id. at 190 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

In addition, the value which is taxed by the Nation in this case is generated on the Reservation by activities that involve the Nation. The value of the Navajo Reservation as a stopping point for travelers and tourists is generated in significant part by the Nation's governance of the Reservation, which makes the Reservation a safe and attractive location for travelers and tourists. There is nothing to suggest that the isolated parcel of fee land on which the Atkinson Trading Company is located has somehow been exempted from the creation of this value.

In these circumstances, the ownership status of land on which the hotel is located has little, if any, relevance. The tax here at issue is imposed on the tourist, not the fee land owner. The tourist plainly has no interest in who owns the parcel on which the hotel is located, and the hotel owner simply collects the tax, which is hardly an undue burden. *Cf. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

Under the *Merrion* test, as informed by the first *Montana* exception, these consensual relationships establish that the Nation has a substantial interest in the tax, and that the taxpayer benefits from the existence of tribal government and the services it provides. The question is then whether these elements, and the consensual relationships which they reflect, outweigh the burden of the tax. In this case, there is no question that the burden of the tax is reasonable. Indeed, here as in *Merrion*, no challenge to the tax is advanced on this ground, nor was such a challenge made in the courts below. *See Atkinson Trading Co. v. Shirley*, 210 F. 3d 1247 (10th Cir. 2000). Even in the absence of the petitioner's concession that the contribution required by the Nation's 8 percent tax is

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622 (1981), in turn quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937)). The same rule applies here.

reasonable, the same conclusion is sustained by the Tenth Circuit's holding that the "burden imposed on [petitioner's] guests in not disproportionate to the benefits they receive by availing themselves of Navajo tribal services, including tourist services." *Id.* at 1264. As the Court held, both Arizona and New Mexico authorize municipalities to apply occupancy taxes which operate in the same manner as the Navajo Nation's tax. *Id.* at 1262-63. Moreover, the Navajo tax is actually imposed at a lower rate than that imposed by many municipalities. *Id.* at 1264. Accordingly, the tax may validly be applied to patrons of the Atkinson Trading Post.

C. The Tribal Tax Here At Issue Is Essential to Tribal Self-Government, as the *Merrion* Test, Informed by the Second *Montana* Exception Shows

Both the *Merrion* test and the second *Montana* exception recognize that the power to tax has a vital and irreplaceable function in tribal government: it enables a tribe to meet its basic governmental responsibilities by "requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion*, 455 U.S. at 137. It is thus essential to the right of self-government. *Id.*; *see also Kerr-McGee*, 471 U.S. at 201.

This interest is given effect in the *Merrion* test, which then inquires whether the taxpayer benefits from the operation of tribal government and the services that it provides. The second *Montana* exception asks whether the taxpayer's activity has a threatened or some direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 566. Here, the question is whether the exercise of the tax power over such activity is a necessary component of tribal self-government. *Strate*, 520 U.S. at 459. Under both, the question is essentially whether the taxable activity has an effect on tribal government's fulfillment of its

basic responsibilities to govern the reservation, and to provide services to those who visit, live and work there. Thus, if the non-Indian activities that are subject to the tax draw upon the benefits of tribal governance and services, and the purpose of the tax is to require those who enjoy such benefits to contribute to their cost, then the exercise of the tax power is essential to the right of self-government, and the requirements of both *Merrion* and the second *Montana* exception are satisfied.

In contrast, the exercise of regulatory authority over non-Indian activity on non-Indian owned fee land is generally supported by a showing that the regulation is necessary to prevent private actions from causing harm to public interests. As *Montana* illustrates, when no such showing is made, the asserted regulatory power cannot be sustained. *Montana*, 450 U.S. at 566-67; *see also*, *Strate*, 520 U.S. at 457-8. A showing of this kind is not necessary to sustain the validity of a tribal tax because the role of taxation is to sustain the government's affirmative obligations, not to prevent private action from causing public harm.

The second *Montana* exception, as applied in the context of the tribal tax power, recognizes that in order to establish and maintain a civil society, a tribe must provide an environment that will attract persons and entities to live, work and make their lives in the reservation's communities. Without fire, police, health and related services, Indian tribes simply cannot remain competitive with other locales that can – through the exercise of the tax power – provide such an attractive environment. The second exception also recognizes that, when the tribe has itself provided this environment, the economic activities of those who benefit from it clearly have a direct effect on the political integrity, economic security, and the health and welfare of the tribe. The activities of such persons

and entities make up the economy of the reservation on which the future of self-determination and self-sufficiency depend.

Furthermore, if a tribal tax enacted to require those who benefit from tribal governance and services to contribute to their cost were held not to apply to non-Indian activity on non-Indian owned fee land, then those who do pay the tax, as well as the tribe itself, would be forced to pay the non-Indians' share. There is no other reasonable option, for denying such benefits to non-Indian fee land owners would plainly impair the development of the reservation's social and economic environment, thus directly conflicting with the federal policy of self-determination, "including its overriding goal of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (internal quotations omitted). Such action might also subject the tribe to claims under the equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8). In these circumstances, then, the exercise of the tribal tax power over non-Indian activity on fee lands is necessary to protect the tribal right of self-government. *Cf. Strate*, 520 U.S. at 459.

As applied to this case, both the *Merrion* test and the second *Montana* exception confirm the validity of the tribal tax. The travelers and tourists who are subject to the tax plainly draw upon the benefits of tribal governance and the services it provides, as we have shown *supra* at 13-15, which establishes a substantial tribal interest in taxing these activities. Additionally, their activities have a direct effect on the political integrity, economic security, and the health and welfare of the tribe for the reasons just shown. Finally, it is clear that the burden of the hotel occupancy tax at issue here is reasonable. *See supra* at 15-16.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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